# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1120

MADALYN MURRAY O'HAIR, ET AL., PETITIONERS,

*v.*

THOMAS O. PAINE, ETC.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners brought this action seeking to enjoin the Administrator of the National Aeronautics and Space Administration from allowing or directing the expenditure of federal funds for religious activities in connection with the nation's space program. Petitioners claimed that federal funds had been used for such activities in connection with the Apollo 8 and Apollo 11 space flights, in that certain astronauts, acting either on orders from NASA or with its consent, had engaged in religious activities or ceremonies.

In particular, petitioners asserted (1) that the astronauts had read from the Christian Bible, engaged in public prayer, and made statements of a religious nature while their activities in the spacecraft were being televised; (2) that the astronauts had carried religious items to the moon and had left those items there; and (3) that the Apollo 8 flight was timed to coincide with the Christmas season. Petitioners sought an order enjoining NASA from doing any act or enforcing any policy which would have the effect of abridging their freedom "from" religion or establishing Christianity as the official religion of the United States.

At the petitioners' request, a three-judge district court was convened. Thereafter, one of the petitioners filed motions challenging the constitutionality of 28 U.S.C. 453—which prescribes the phrase "So help me God" as part of the judicial oath of office—and requesting that the members of the three-judge court disqualify themselves. In seeking recusal she asserted that the oath's effect is to exclude persons sharing her theological views—*i.e.*, atheists—from federal judgeships and thus to abridge her First Amendment rights.

The three-judge court denied the motions and then determined that the case was not a proper one for a three-judge court (Pet. App. 9a). Accordingly, that court remanded the case to the single district judge,[1] who then issued a written opinion dismissing the com-

[1] Petitioners' direct appeal to this Court from the order dissolving the three-judge court was dismissed for lack of jurisdiction. 397 U.S. 531 (Pet. App. 17a).

plaint (Pet. App. 10a-14a). The court of appeals affirmed, holding in a *per curiam* opinion that petitioners had no ascertainable legal interest in the issues which they sought to raise and that they had failed to state a claim entitling them to relief (Pet. App. 18a-19a).

2. This Court's decisions interpreting the religion clauses compel rejection of petitioners' claims. The dismissal of the complaint was correct and further review is unwarranted.

a. The petitioners' reliance (Pet. 8) on taxpayer status to establish standing to maintain this action is misplaced. In *Flast* v. *Cohen*, 392 U.S. 83, this Court held that those who wish to bring taxpayer suits "must establish a logical link between that status and the type of legislative enactment attacked;" in other words, taxpayers can challenge only "exercises of congressional power under the taxing and spending clause." 392 U.S. at 102. "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute" (*ibid.*). But, as petitioners conceded in their district court brief (p. 2), their challenge is not to any exercise of congressional power; instead, their claim fits precisely into the mold that was viewed in *Flast* as insufficient—*i.e.*, that NASA had made incidental expenditures which (in their view) promoted an establishment of religion, while carrying out the otherwise entirely secular national commitment to space exploration. The court below correctly recognized that, under *Flast*, suits based on such allegations may not be maintained.

b. Even if petitioners had some other, non-taxpayer, status which did confer standing upon them (cf. *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n. 9), their claim that the Establishment Clause has been violated would be insubstantial.[2] Permitting items personal to the astronauts to be carried—an approach which accords recognition to the astronauts' free exercise rights—does not violate the Establishment Clause, even if additional expenditures are thereby incurred, for that practice has the secular purpose and primary secular effect (*Abington School District* v. *Schempp*, *supra*, 374 U.S. at 222) of improving the morale of the astronauts and thereby contributing to the success of the flight. The religious items intended for ceremonial use are also unobjectionable; established constitutional doctrine permits the inclusion of religious references during ceremonial occasions. *Engel* v. *Vitale*, 370 U.S. 421, 435 n. 21. For similar reasons, the religiously oriented statements made by the astronauts are not constitutionally impermissible.[3]

c. The court below correctly rejected petitioners' challenge to the judicial oath. The oath is merely ceremonial in nature, and thus unobjectionable under

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[2] The showing of coercion required to establish a claim under the Free Exercise Clause is completely lacking here. *Abington School District* v. *Schempp*, 374 U.S. 203, 223.

[3] Since the court of appeals indicated it was "construing the complaint in the light most favorable" to petitioners (Pet. App. 19a), there is no occasion for this Court to consider the petitioners' contention (Pet. 10) that the district court should not have relied upon the affidavit submitted by respondent Paine.

the Establishment Clause. See *Engel* v. *Vitale*, *supra*, 370 U.S. 421, 435 n. 21; *Zorach* v. *Clauson*, 343 U.S. 306, 312-313. And the Constitution itself makes plain that a candidate for federal judicial office may not be barred from office for refusal to take the oath, and provides for the alternative of affirmation. Constitution of the United States, Article VI, Section 3. See also *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 223. This case is, therefore, entirely unlike *Torcaso* v. *Watkins*, 367 U.S. 488, in which the plaintiff was a candidate for state office who had been barred from that office for failure to attest to a belief in the existence of God.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

FEBRUARY 1971.

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